Supreme Court, U.S.
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No. 97-995

In The

Supreme Court of the United States

October Term, 1997

BROWNING-FERRIS, INC., et al.,

Petitioners,

v.

SUN CO., INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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38 pp

STATEMENT OF ISSUE PRESENTED

WHAT IS THE APPROPRIATE STATUTE OF LIMITATIONS FOR A CONTRIBUTION ACTION UNDER CERCLA THAT IS THE "INITIAL ACTION" TO RECOVER RESPONSE COSTS PURSUANT TO CERCLA § 113(g)(2) AND THAT ARISES IN THE ABSENCE OF THE OCCURRENCE OF ANY OF THE TRIGGERING EVENTS SPECIFIED UNDER CERCLA § 113(g)(3)?

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, Respondents state as follows:

Sun Co., Inc. (R & M) ("Sun") is a wholly owned subsidiary of Sun Co., Inc., a Pennsylvania corporation with stock traded on the New York Stock Exchange. Sun Co., Inc., has no non-wholly owned subsidiaries.

Texaco Inc. ("Texaco") is a Delaware corporation with stock traded on the New York Stock Exchange. Texaco has no parents, subsidiaries or affiliates that have issued shares to the public, except Texaco Capital L.L.C. and Texaco Capital Inc.

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OPINION BELOW

Petitioners erroneously cited the opinion below. The Tenth Circuit Court of Appeals' opinion is reported at 124 F.3d 1187.

STATEMENT OF THE CASE

INTRODUCTION

This case arises out of a unique set of facts. The Tenth Circuit opinion below is the only reported or published circuit court opinion confronting the issue of the appropriate statute of limitations for a contribution action which is the "initial action" for the recovery of cleanup costs.

Petitioners seek review claiming a conflict among the circuit courts pursuant to Supreme Court Rule 10(a).[1] Petitioners argue the Tenth Circuit opinion below conflicts with decisions by the First, Third, Fifth and Eleventh Circuits regarding the delineation between contribution actions and cost recovery actions. That delineation is not the issue presented here for review. The statute of limitations issue is the only issue before this Court.

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[1] Supreme Court Rule 10(a) provides that the character of the reasons the Court considers when ruling on a petition for writ of certiorari includes:

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.

Respondents request this Court to recognize Petitioners' attempts to manufacture a conflict among the circuit courts. This Court should instead conserve its judicial discretion – which is reserved "only for compelling reasons" pursuant to Supreme Court Rule 10[2] – for a controversy which truly warrants this Court's time and consideration. This Court should deny the Petition.

THE FACTS

Respondents, Plaintiffs-Appellants below, Sun Company, Inc. (R & M) and Texaco Inc. (Sun and Texaco or Respondents) sued Petitioners, Defendants-Appellees below, and others, under the Comprehensive Environmental, Response, Compensation and Liability Act of 1980 (CERCLA)[3] seeking recovery of response costs incurred in cleaning up the Compass Industries, Inc. Landfill (Site) in Tulsa, Oklahoma.

The Environmental Protection Agency (EPA) requested Sun, Texaco, and other parties to clean up the Site. Attempts to negotiate a consent decree were unsuccessful. Consequently, in May of 1989, the EPA issued a unilateral administrative order under CERCLA § 106, 42 U.S.C. § 9606 (§ 106 Order). The § 106 Order directed Sun and Texaco, Braniff, Inc., Standard Royalties, Inc., Fourth National Bank of Tulsa, Billy Charles Jackson, Sr., and

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[2] "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10.

[3] 42 U.S.C. § 9601 *et seq.*

Bellamah Community Development to remediate the Site. Only Sun and Texaco complied with the § 106 Order, cleaning up the Site starting in January 1990. Sun and Texaco completed the remediation August 29, 1991.

Following the cleanup, Sun and Texaco searched for "potentially responsible parties" (PRPs) identified in CERCLA § 107(a)[4] and filed this action on August 29, 1994. Because they incurred response costs conducting the mandated remediation consistent with the § 106 Order, Sun and Texaco sued for cost recovery under CERCLA § 107(a), and contribution under CERCLA § 113(f).[5] Declaratory relief and various state law claims were also included.

Petitioners sought summary judgment before the United States District Court for the Northern District of Oklahoma (trial court) claiming two main defects in the theories of recovery advanced by Sun and Texaco. First, Petitioners claimed Sun's and Texaco's CERCLA § 113(f) contribution claim was time barred in whole or part under CERCLA § 113(g)(3).[6] Second, Petitioners claimed that, as alleged PRPs, Sun and Texaco were not legally entitled to bring a CERCLA § 107(a) response cost recovery action.

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[4] CERCLA § 107(a), 42 U.S.C. § 9607(a) (referred to as "CERCLA § 107(a)" or "§ 107(a)").

[5] CERCLA § 113(f), 42 U.S.C. § 9613(f) (referred to as "CERCLA § 113(f)" or "§ 113(f)").

[6] CERCLA § 113(g)(3), 42 U.S.C. § 9613(g)(3) (referred to as "CERCLA § 113(g)(3)" or "§ 113(g)(3)").

Respondents objected to Petitioners' arguments. Sun and Texaco responded that because no triggering event had yet occurred under CERCLA § 113(g)(3), the contribution claim was timely. They also explained that the right to seek contribution under CERCLA should be triggered only upon the occurrence of an event which fixes liability – an interpretation consistent with the express triggering events provided by Congress in CERCLA § 113(g)(3). Further, Sun and Texaco argued that their contribution action was the "initial action" with respect to the Site under CERCLA § 113(g)(2),[7] and was therefore subject to the six year statute of limitations contained in CERCLA § 113(g)(2). Finally, Sun and Texaco argued that permitting an alleged PRP to seek response costs from other PRPs pursuant to CERCLA § 107(a) is consistent with the plain language of CERCLA and Congress' intent in enacting CERCLA.

The trial court agreed that none of the triggering events identified by Congress in CERCLA § 113(g)(3) had occurred but concluded a gap therefore existed in the statute. Applying admiralty jurisprudence and federal common law, the trial court ruled the three year statute of limitations for CERCLA § 113(f) contribution actions accrued when the party seeking contribution has paid more than its "fair share" of a common liability.[8]

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[7] CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2) (referred to as "CERCLA § 113(g)(2)" or "§ 113(g)(2)").

[8] In so holding, the trial court relied on an admiralty opinion from the Third Circuit which determined a commencement date for contribution actions involving wrongful death in admiralty cases. *See Sea Land Service, Inc. v. United States*, 874 F.2d 169, 171 (3rd Cir. 1989).

The trial court also ruled Sun and Texaco could not bring a CERCLA § 107(a) cost recovery action. The trial court limited Sun and Texaco to the CERCLA § 113(f) contribution claim.

THE TENTH CIRCUIT'S OPINION BELOW

On appeal, the Tenth Circuit reversed the trial court on the statute of limitations issue and affirmed the trial court on the issue of the Respondents' cost recovery action under CERCLA § 107(a). *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997), Pet. App. at 1a.

The Tenth Circuit ruled that Sun and Texaco, as potential PRPs at the Site, could not seek cost recovery under CERCLA § 107(a). The Tenth Circuit ruled Respondents' CERCLA claim against Petitioners was a claim "by and between jointly and severally liable parties, seeking equitable apportionment of a payment which [Respondents] have been compelled to make." *Id.* at 1190, Pet. App. at 8a. Such claim, the court concluded, was " 'the quintessential claim for contribution.' " *Id.* (*quoting Bancamerica Commercial Corp. v. Mosher Steel of Kansas*, 100 F.3d 792, 800 (10th Cir.), *as amended*, 103 F.3d 80 (1996)), Pet. App. at 7a. Neither Sun and Texaco nor the Petitioners appeal that portion of the Tenth Circuit's ruling.

Next, the Tenth Circuit ruled on the issue of the applicable statute of limitations for contribution actions by PRPs where none of the triggering events under CERCLA § 113(g)(3) have occurred. The court below read CERCLA's statutes of limitations so as to leave no "inadvertent gap" in the statutory language.

The Tenth Circuit acknowledged PRPs who incur "cleanup costs pursuant to a unilateral administrative order (or by a consent decree, or in some cases, voluntarily) potentially have an unlimited time in which to bring their contribution claims," because those procedures have no triggering events listed in § 113(g)(3). *Id.* at 1191, Pet. App. at 9a. However, the Tenth Circuit rejected the district court's reasoning that this anomaly was caused by an inadvertent gap in the statute requiring the adoption of a triggering event from another area of federal or state law. *Id.* at 1192, Pet. App. at 11a. Rather, the Tenth Circuit found the appropriate statute of limitations in § 113(g)(2) and applied it consistently with the language in § 113(g)(3).

The Tenth Circuit noted that Congress "did not create a new cause of action, nor did it create any new liabilities" when it enacted § 113(f). *Id.* at 1191 (*citing Bancamerica Commercial Corp.*, 100 F.3d at 800), Pet. App. at 9a. Rather, CERCLA § 113(f) specifically incorporates and expressly refers to the liabilities and costs contained in § 107(a), "as those are the costs to be equitably apportioned." *Id.*[9]

The court was careful, however, to distinguish between the two similar actions:

> While a § 113 contribution action is not a "cost recovery" action under § 107 as that action has

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[9] The Tenth Circuit cited other opinions which have reached similar conclusions regarding the interplay between CERCLA §§ 107(a) and 113(f). *Citing Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122 (3rd Cir. 1997).

> been defined, because it does not impose strict, joint and several liability on the defendant PRPs, it *is* an action for recovery of the *costs referred to* in § 107. Under CERCLA's statutory scheme, therefore, a PRP's contribution action seeks to recover costs referred to in § 107 from PRPs whose liability is defined by § 107, but is governed by the equitable apportionment principles established in § 113(f).

Id. (*citing Pinal Creek Group*, 118 F.3d at 1306) (emphasis in original), Pet. App. at 10a. Therefore, a contribution action between PRPs who have potential liability, as defined in § 107(a), at a Superfund site for those costs referred to in § 107(a), is governed by the equitable contribution principles of § 113(f). *Id.*

All contribution actions, however, are not governed by the same statute of limitations. *Id.* at 1192, Pet. App. at 10a. Contribution actions by PRPs in a common context, during litigation or following a judgment or settlement in a civil action, are governed by the three year statute of limitations set forth in § 113(g)(3). *Id.* Under those circumstances, if the civil suit proceeds to conclusion, the statute of limitations is triggered on the date of the judgment under § 113(g)(3)(A). *Id.* Alternatively, if a settlement is reached, the statute of limitations is triggered on the date of the administrative order embodying the settlement, or on the date of entry of a judicially approved settlement under § 113(g)(3)(B). *Id.*, Pet. App. at 11a. In addition, some settlements reached prior to litigation, i.e., *de minimis* and cost recovery settlements under § 122(g) and (h), respectively, are also covered by the three year statute. *Id.* The Tenth Circuit recognized that these triggering events have procedural safeguards – a judgment

possesses its own inherent safeguards, and these two types of settlements under CERCLA are subject to publication in the Federal Register and a 30-day notice and comment period. *Id.*[10]

Those procedural safeguards, however, are not present where a PRP incurs cleanup costs in some way other than those covered under § 113(g)(3), such as in compliance with a § 106 order, with an administrative consent order requiring cleanup work, or voluntarily. Those PRPs are not left unprotected: "PRPs who have incurred cleanup costs in some other way are also covered by the language of § 113(f): 'Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§§ 106 or 107] of this title.' " *Id.*, Pet. App. at 11a.

The Tenth Circuit rejected the district court's conclusion that a gap existed in the statute of limitations merely because PRPs may incur response costs other than as indicated in § 113(g)(3) and therefore may not be covered by those provisions. *Id.* Rather, the Tenth Circuit ruled that such PRPs are covered by the statute of limitations in § 113(g)(2), which provides the limitations period for an "initial action" for the recovery of § 107 costs. *Id.*, Pet. App. at 11a-12a.

In other words, when a PRP seeks contribution but no prior civil action has been filed under §§ 106 or 107, that PRP's contribution action is the "initial action" specified in § 113(g)(2) for the recovery of costs referred to in § 107. Such action must therefore be brought, for remedial

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[10] *See* CERCLA § 122(i), 42 U.S.C. § 9622(i).

actions, within six years after initiation of physical on-site construction of the remedial action, or, for removal actions, within three years of completion of the removal action. *Id.* at 1194, Pet. App. at 15a. Petitioners never mention this important concept in their Petition, thereby ignoring the basis of the Tenth Circuit's opinion and specific statutory language in § 113(g)(2).

Under the Tenth Circuit's ruling, there are two types of contribution actions under CERCLA. First, CERCLA provides an implied right of contribution under CERCLA § 107(a) for an "initial action" to recover response costs, which is governed by the limitations periods of § 113(g)(2). Second, CERCLA provides an express right of contribution under CERCLA § 113(f) which are not the "initial action." In this latter case, by definition, a previous action will have been filed and one of the triggering events under § 113(g)(3) will have occurred. *Id.* at 1193, Pet. App. at 13a. The two different contribution actions under CERCLA are "each governed by the same equitable rules of § 113(f) and each seeking to equitably apportion costs referred to in § 107, but governed by different statutes of limitations." *Id.*[11]

The court interpreted CERCLA's statutes of limitations to cover the entire gamut of possible contribution actions by PRPs under CERCLA, leaving no "inadvertent gap" in the statute:

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[11] In so ruling, the Court acknowledge this Court's language in *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994), where this Court recognized two "similar and somewhat overlapping" contribution actions under CERCLA §§ 107 and 113.

> This construction of CERCLA is internally consistent in its application of the language of the statute, and follows our precedents and the increasing body of law from other circuits. Together, §§ 107 and 113 allow "any person" who has incurred cleanup costs consistent with the National Contingency Plan to recover some or all of those costs from PRPs who were responsible for the waste. . . . A PRP who contributed to the waste may recover from other PRPs a portion of the costs it expended in cleaning up the site in a contribution action under § 113(f). The liability of other PRPs will be defined by § 107, but under § 113(f), that liability will be several, and the total cleanup costs – including responsibility for "orphan shares" – will be equitably apportioned among all the PRPs, with the court being able to consider any factors it deems relevant.

Id. (citations and footnotes omitted), Pet. App. at 13a-14a. This interpretation also gives effect to each section of the statute.

Petitioners claim the Tenth Circuit opinion below conflicts with opinions by the First, Third, Fifth and Eleventh Circuits that recognize "contribution and cost recovery actions are mutually exclusive and non-overlapping." Petition at p. 3. None of those circuit courts have ruled that the two actions under CERCLA are mutually exclusive and non-overlapping. Petitioners have not cited any such holding from any opinion. Also, as this Court recognized in *Key Tronic Corp.*, 511 U.S. at 816, "the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." Finally,

CERCLA § 113(f) incorporates the liabilities of § 107(a). Section 107 is substantive, defining liabilities; § 113 is procedural, providing statutes of limitations. The two sections work together and are not mutually exclusive.

ARGUMENT

I. THE CIRCUIT COURT DECISIONS WHICH PETITIONERS CLAIM CONFLICT WITH THE DECISION BELOW DID NOT INVOLVE THE STATUTE OF LIMITATIONS ISSUE RAISED BY PETITIONERS.

Contrary to Petitioners' assertions, the Tenth Circuit's opinion below does not conflict with any other circuit court opinions. The Tenth Circuit is the only circuit court to confront the issue of the appropriate statute of limitations for those contribution actions under CERCLA § 113(f) that are "initial action[s]" as provided in CERCLA § 113(g)(2) and that arise in the absence of the occurrence of any of the triggering events specified under CERCLA § 113(g)(3).

Petitioners generate an imaginary conflict among decisions of various circuit courts in hopes of convincing this Court to exercise its judicial discretion and grant certiorari. Petitioners attempt to focus this Court on language that constitutes neither the holding of the Tenth Circuit below nor the issue on appeal, and to compare that language with dicta from other circuit courts in an attempt to manufacture a conflict between the circuit courts. As will be shown, the ruling of the Tenth Circuit below tracks perfectly with the substance of the circuit

court opinions upon which Petitioners rely as grounds for manufacturing the alleged conflict.

A. THE TENTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH THE THIRD CIRCUIT'S DECISION IN *IN RE READING CO.*

Petitioners claim the Tenth Circuit's opinion below conflicts with the Third Circuit's opinion in *In re Reading Co.*, 115 F.3d 1111 (3rd Cir. 1997). Contrary to Petitioners' assertions, the opinion below does not conflict with *Reading*.

Reading did not involve the issue of the appropriate statute of limitations for a PRP's contribution action that is the "initial action" for recovery of § 107 costs arising in the absence of the occurrence of any of the triggering events under CERCLA § 113(g)(3). In *Reading*, the lawsuit at issue against Reading Company was a contribution action arising out of an earlier CERCLA § 107(a) action filed by the United States. *Id.* at 1116. Here, there was no prior action that would give rise to the occurrence of any of the triggering events identified in CERCLA § 113(g)(3).

The question presented in *Reading* was whether Reading Company's potential CERCLA liability to the United States had been discharged in an earlier bankruptcy proceeding. *Reading*, 115 F.3d at 1117. *Reading* did not involve the statute of limitations issue for which Petitioners seek review by this Court.

Reading and *Sun Co., Inc.* both consistently stand for the proposition that PRPs suing under CERCLA are limited to contribution actions which equitably apportion liability for response costs. In *Sun Co., Inc.*, the Tenth Circuit concluded an action by a PRP to recover response costs is "the quintessential claim for contribution," "and is governed by the equitable principles of § 113(f)." *Sun Co., Inc.*, 124 F.3d at 1194 (*quoting United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995)), Pet. App. at 15a. Similarly, in *Reading*, the Third Circuit held that an action by a PRP to recover response costs under CERCLA from another PRP is a contribution action under CERCLA § 113(f)(1) and not a traditional cost recovery action under CERCLA § 107(a). *Reading*, 115 F.3d at 1119. Both opinions are consistent in their treatment of PRPs suing for recovery of cleanup costs under CERCLA. There is no need for this Court to exercise its discretionary jurisdiction.

1. THE TENTH CIRCUIT DID NOT FIND ANY CONFLICT BETWEEN ITS HOLDING BELOW AND THE THIRD CIRCUIT'S HOLDING IN *READING*.

Petitioners contend the Tenth Circuit acknowledged a conflict with the Third Circuit's opinion in *Reading*. In so arguing, Petitioners focus on one sentence in the opinion below: "To the extent that *Reading* would find fault with our construction because it suggests the availability of a '§ 107 contribution action' for certain PRPs, we believe the Third Circuit's concern reflects a misconception of the relationship between §§ 107 and 113." Petitioners omitted the Tenth Circuit's explanation of this misconception and

the harmonization of the Tenth Circuit's rationale with the rationale of *Reading*.

Rather than recognizing a conflict, the Tenth Circuit explained how its ruling was consistent with *Reading* and would not offend the contribution protection provisions of CERCLA as the Third Circuit feared. The Tenth Circuit explained:

> Our construction of the statute does not divide contribution actions into § 113 actions and § 107 actions depending on the procedural posture of the plaintiff PRP. On the contrary, our holding merely recognizes that while all actions by and between jointly and severally liable PRPs are 'actions under § 107' for purposes of liability, they are still contribution actions governed by § 113(f). By its terms, the contribution defense embodied in § 113(f)(2) is applicable to any claim for contribution. Thus, regardless of whether the plaintiff PRP incurred costs pursuant to a civil action or through some other proceeding, any defendant PRP who has resolved its liability to the government in an administrative or judicially approved settlement may invoke the contribution defense contained in § 113(f)(2).

Sun Co., Inc., 124 F.3d at 1193-94, Pet. App. at 14a-15a. In other words, the Tenth Circuit explained how its holding would not throw the proverbial monkey wrench into the works, as the Third Circuit feared, by allowing PRPs to "end run" the contribution protection provisions of § 113(f)(2) and (3). *Reading*, 115 F.3d at 1119.

There is no "expressly acknowledged" conflict between *Sun Co., Inc.* and *Reading*. No justification exists for this Court to exercise its discretionary judicial review in this case.

2. IF ANY CONFLICT EXISTS BETWEEN THE TENTH CIRCUIT'S OPINION BELOW AND THE THIRD CIRCUIT'S OPINION IT IS ILLUSORY AND DOES NOT WARRANT THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION.

The imagined conflict Petitioners attempt to create between the rulings of *Sun Co., Inc.* and *Reading* is spurious. Petitioners claim the conflict exists in that *Reading* concluded there is no longer an implied contribution action under CERCLA § 107(a), because Congress replaced that action with the express right of contribution under CERCLA § 113(f), *Reading*, 115 F.3d at 1119, but *Sun Co., Inc.* concluded there are two "similar and somewhat overlapping" contribution actions under CERCLA. *Sun Co., Inc.*, 124 F.3d at 1193 (*quoting Key Tronic Corp.*, 511 U.S. at 816), Pet. App. at 13a. These two concepts are not in conflict.

The end result is the same in both cases. PRPs suing other PRPs are limited to contribution actions under CERCLA that equitably apportion cleanup costs and are subject to the contribution protection provisions of CERCLA § 113(f)(2) and (3). The contribution actions recognized in both *Reading* and *Sun Co., Inc.* are identical.

The only difference between *Sun Co., Inc.* and *Reading* is that the Tenth Circuit took its decision one step further. As demanded by the question presented to the Tenth Circuit, it ruled on the issue of the appropriate statute of limitations for contribution actions that are the initial actions for cleanup costs and fall outside the express triggering events under CERCLA § 113(g)(3).

The Tenth Circuit opinion below is the only circuit court opinion which has directly confronted this issue to date. There is no reason for this Court to exercise its judicial discretion in this case.

B. THE TENTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH THE FIRST CIRCUIT'S DECISION IN *UNITED TECHNOLOGIES CORP. V. BROWNING-FERRIS INDUSTRIES, INC.*

Petitioners also claim the Tenth Circuit's opinion below conflicts with the First Circuit's decision in *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). Again, Petitioners attempt to create a circuit court conflict where none exists.

The First Circuit acknowledged that a situation could arise where a PRP could clean up a hazardous substance site and seek contribution in the absence of any of the triggering events contained in CERCLA § 113(g)(3), although that was not the issue presented to that court. *Id.*, at 99-100 n.8 (*citing Key Tronic Corp*, 511 U.S. at 816 (explaining that CERCLA now "expressly authorizes a cause of action for contribution in [§ 9613] and impliedly

authorizes a similar and somewhat overlapping remedy in [§ 9607]")). The First Circuit expressly recognized, however, such issue was not before it:

> If, indeed, the law allows such an implied right of action for contribution to be maintained – a matter on which we take no view – it is unclear to us whether such a cause of action would be subject to the three-year or the six-year prescriptive period. Because this appeal does not pose that question, we leave it for another day.

Id.

In other words, the precise issue raised on appeal here was recognized and left for another case by the First Circuit. There can be no conflict between two rulings where one court did not rule on the issue.

Additionally, the factual basis giving rise to the contribution actions in *United Technologies Corp.* and *Sun Co., Inc.* are distinguishable, which explains any misconceived conflict. In *United Technologies Corp.*, the PRP sought contribution more than five years after judicial approval of a consent decree – one of the four express events triggering the three year statute of limitations for contribution actions under CERCLA § 113(g)(3). *Id.* at 97. In *Sun Co., Inc.*, on the other hand, no consent decree was ever judicially approved, nor did any other triggering event specified under CERCLA § 113(g)(3) ever occur. *Sun Co., Inc.*, 124 F.3d at 1189, Pet. App. at 5a. The fact that there had been no "initial action" for response costs and none of the triggering events had ever occurred formed the basis for the Tenth Circuit's holding below. *Id.* at 1191,

Pet. App. at 8a. The facts before the First Circuit in *United Technologies Corp.* did not give rise to that issue.

As no real conflict exists between the circuits, this Court should not expend its discretionary judicial review to grant a writ of certiorari.

C. THE TENTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH THE FIFTH CIRCUIT'S DECISION IN *OHM REMEDIATION SERVS. V. EVANS COOPERAGE CO., INC.*

Petitioners claim a conflict exists between the Tenth Circuit's opinion below and the Fifth Circuit's opinion in *OHM Remediation Servs. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574 (5th Cir. 1997). As with the other circuit court opinions upon which Petitioners rely as grounds for a conflict, there is no conflict between these two circuit court opinions.

The Fifth Circuit's opinion in *OHM Remediation Servs.* did not confront the statute of limitations issue decided by the Tenth Circuit below. The two issues presented to the Fifth Circuit in *OHM Remediation Servs.* were "issues of first impression in the federal courts of appeal," *id.* at 1577, and were concerned with: (1) whether a cause of action for response costs under § 107(a) was limited to persons with a "protectable interest" in a CERCLA site, *id.* at 1579; and (2) whether a contribution action under § 113(f) could be brought by a party that was not liable or potentially liable. *Id.* at 1580. No statute of limitations issue was presented to the Fifth Circuit.

There is no conflict between the Tenth Circuit's opinion below and the Fifth Circuit's opinion in *OHM Remediation Servs.* Issuing a writ of certiorari is inappropriate in this case.

D. THE TENTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN *REDWING CARRIERS, INC. V. SARALAND APARTMENTS.*

Petitioners also claim a conflict exists between the Tenth Circuit's opinion below and the Eleventh Circuit's opinion in *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996). To the contrary, the two opinions are wholly consistent.

In *Redwing Carriers*, the Eleventh Circuit ruled, as did the Tenth Circuit below, that "when one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a). Rather, it is a claim for contribution under § 113(f)." *Redwing Carriers*, 94 F.3d at 1513 (*citing Colorado & Eastern*, 50 F.3d at 1535). More importantly, the Eleventh Circuit ruled that "[w]hether Redwing brings its claims under § 107(a) or § 113(f) does not matter insofar as establishing the Appellees' liability. *The elements of a claim under both sections are the same.*" *Redwing Carriers*, 94 F.3d at 1496 (emphasis added). The highlighted language is identical in substance to the Tenth Circuit's holding below:

> Under CERCLA's statutory scheme, therefore, a PRP's contribution action seeks to recover costs referred to in § 107 from PRPs whose liability is

> defined by § 107, but is governed by the equitable apportionment principles established in § 113(f).

Sun Co., Inc., 124 F.3d at 1191, Pet. App. at 10a. The end result of both opinions is wholly consistent.

More importantly, the issue of the appropriate statute of limitations for a PRP's contribution action which is the initial action was not an issue presented to, or decided by, the Eleventh Circuit in *Redwing Carriers*. There is no conflict between the Tenth Circuit's opinion below and any opinion by any other circuit court.

E. THE TENTH CIRCUIT'S OPINION BELOW IS CONSISTENT WITH THE NINTH CIRCUIT'S OPINION IN *PINAL CREEK GROUP V. NEWMONT MINING CORP.*

Petitioners concede the Tenth Circuit's opinion is consistent with the Ninth Circuit's opinion in *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997). Again, the statute of limitations issue presented to the Tenth Circuit below was not an issue in *Pinal Creek Group*. Instead, the issue presented there was whether a PRP could pursue a cost recovery action under CERCLA § 107(a) and thereby recover a joint and several judgment against other PRPs. *Id.* at 1299-1300.

The Ninth Circuit concluded a CERCLA claim by one PRP against another PRP is necessarily a contribution action. *Id.* at 1301. That holding, as far as it goes, is consistent with the holdings in *Reading*, 115 F.3d at 1119,

United Technologies Corp., 33 F.3d at 100-01, *Redwing Carriers*, 94 F.3d at 1513,[12] which are the circuit court opinions upon which Petitioners rely to contend a conflict exists, and with the Tenth Circuit opinion below. *See Sun Co., Inc.*, 124 F.3d at 1194, Pet. App. at 15a.

At least one district court has interpreted the holdings of the Tenth Circuit in *Sun Co., Inc.*, the First Circuit in *United Technologies Corp.*, the Eleventh Circuit in *Redwing Carriers*, and the Ninth Circuit in *Pinal Creek Group* as consistent with each other as well as consistent with the holdings of the Third Circuit in *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3rd Cir. 1997), and the Seventh Circuit in *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994). *See Town of Oyster Bay v. Occidental Chem. Corp.*, ___ F. Supp. ___, No. 94-CV-0694(FB), 1997 WL 760189, at *25 (E.D. N.Y. Dec. 5, 1997). Petitioners are apparently the only ones who perceive a conflict in the circuit court opinions.

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[12] Petitioners also rely on *OHM Remediation Servs.* to contend a conflict exists. As previously noted, *supra* Section I(C), the issues raised there are very different from the issue decided in the Tenth Circuit opinion below.

II. THERE IS NO THREE-WAY SPLIT AMONG THE CIRCUIT COURTS REGARDING THE APPROPRIATE STATUTE OF LIMITATIONS FOR A PRP'S CONTRIBUTION ACTION WHICH IS THE INITIAL ACTION ARISING IN THE ABSENCE OF ANY TRIGGERING EVENTS SPECIFIED IN CERCLA § 113(g)(3).

Petitioners claim there is a three way split of authority on the issue of the appropriate statute of limitations for contribution actions under CERCLA in the absence of the occurrence of one of the four express triggering events found in CERCLA § 113(g)(3). To the contrary, the Tenth Circuit's opinion below was the first, and still the only, circuit court opinion answering that question. The decisions to which Petitioners cite as a basis for creating this alleged conflict did not confront the question answered by the Tenth Circuit below. There is no conflict among the circuit court opinions which warrant the exercise of this Court's judicial discretion.

A. THE TENTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH THE SEVENTH CIRCUIT'S OPINION IN *RUMPKE OF INDIANA, INC. V. CUMMINS ENGINE CO.*

Petitioners claim the Tenth Circuit opinion below conflicts with the Seventh Circuit opinion in *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235 (7th Cir. 1997). *Rumpke of Indiana* did not rule on the statute of limitations issue presented for review here. The issue presented in *Rumpke* concerned the scope of the contribution protection provision of a judicially approved consent decree covering a site other than the site for which the

plaintiff sought cost recovery and contribution. In other words, no statute of limitations question was presented to the Seventh Circuit in *Rumpke of Indiana*.

The Seventh Circuit adopted the same implied contribution right recognized by *Sun Co., Inc.*:

> To the extent this looks like an implied claim for contribution, where the landowner is alleging that its share should be zero, we note that dicta in the Supreme Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994), suggests that the Court was not disturbed by that possibility. *See* 511 U.S. at 816, 114 S.Ct. at 1967.

Rumpke of Indiana, 107 F.3d at 1235. This language is plainly consistent with the Tenth Circuit's holding below.

As Petitioners note, the Seventh Circuit discussed statutes of limitations in dicta. Petitioners quote one sentence from *Rumpke*: "The contribution claim would not accrue until one of the events specified in § 9613(g)(2) [sic] occurred, at which time three years would be available in which to file an appropriate suit." *Id.* at 1241. The quoted language was not material to the Seventh Circuit's decision of the issue actually presented and therefore constitutes dicta. BLACK'S LAW DICTIONARY 454 (6th ed. 1990).

Even if that dicta conflicts with the Tenth Circuit's ruling below it would not warrant the exercise of this Court's discretionary review. Dicta does not constitute a holding of a court. *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995). Until a circuit court actually rules on an issue, no precedent has been set by that

circuit court. *United States v. Ricks*, 5 F.3d 48, 50 (3rd Cir. 1993). There is no conflict between the Tenth Circuit opinion below and any other circuit court holding.

To the extent Petitioners advocate a holding similar to the dicta in *Rumpke of Indiana*, such conclusion would be inconsistent with the public policy of CERCLA. Petitioners argue "the Seventh Circuit denies non-innocent PRPs, such as plaintiffs, a remedy under CERCLA § 113(f)(1) unless a triggering event has occurred, for until that time '[t]he contribution claim would not accrue.' " Petition at p. 19 (*quoting Rumpke of Indiana*, 107 F.3d at 1241) (footnote omitted). Congress clearly did not intend to deprive certain categories of PRPs of a right of contribution when it allows "[a]ny person" to recover its response costs. CERCLA § 113(f)(1). Such an absurd result warps the language of CERCLA, disregards the "initial action" language in CERCLA § 113(g)(2), and defeats the public policy of CERCLA. *See infra* Section III.

B. A SPLIT OF AUTHORITY BETWEEN A CIRCUIT COURT AND DISTRICT COURT OPINIONS FROM OTHER CIRCUITS DOES NOT WARRANT THIS COURT'S DISCRETIONARY REVIEW.

Petitioners argue that a split exists between the Tenth Circuit opinion below and *Gould, Inc. v. A&M Battery & Tire Service*, 901 F. Supp. 906, 914-15 (M.D. Pa. 1995), and *Reichhold Chemicals, Inc. v. Textron, Inc.*, 888 F. Supp. 1116 (N.D. Fla. 1995). Even if the Tenth Circuit's opinion below conflicts with those two district court opinions, such a conflict does not warrant this Court's expenditure of its

limited judicial resources. However, the district court opinion in *Reichhold Chemicals* is not inconsistent with the Tenth Circuit's opinion.

The United States District Court for the Northern District of Florida concluded that a plaintiff's contribution action was timely where none of the triggering events had occurred. *Reichhold Chemicals*, 888 F. Supp. at 1125. The court noted, consistently with the Tenth Circuit, that "[b]y its explicit language, this limitations statute [§ 113(g)(2)] applies only to cost recovery actions under § 107." *Id.* at 1124.

Whether or not a conflict exists between the Tenth Circuit's opinion below and the opinions of two non-Tenth Circuit district courts is irrelevant. A conflict between a circuit court's opinion and one or more district courts' opinions does not warrant the issuance of a writ of certiorari. Supreme Court Rule 10(a) (the factors this Court considers when ruling on a petition for writ of certiorari include "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); *see also* 23 James W. Moore, Moore's Federal Practice ¶ 510.21 (3d ed. 1997).

There is no split of circuit court opinions which warrants review by this Court.

III. THE TENTH CIRCUIT BELOW CORRECTLY CONCLUDED THERE IS NO GAP IN CERCLA'S STATUTE OF LIMITATIONS TO BE FILLED IN, THUS THERE WAS NO NEED TO LOOK TO A STATE'S STATUTE OF LIMITATIONS; CERCLA PROVIDES ALL THE STATUTES OF LIMITATIONS NECESSARY.

Petitioners claim the Tenth Circuit opinion below is inconsistent with the decisions of this Court which have found statutes of limitations for federal actions in state law. Petition p. 26 (*citing North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995); *Wilson v. Garcia*, 471 U.S. 261, 266-67 n.12 (1985); and *Reed v. United Transp. Union*, 488 U.S. 319, 323-24 (1989)). Each of those cases involved statutes that lacked statutes of limitations. In the case below, there are statutes of limitations in CERCLA and no gap in the statute needs to be filled by the court.

CERCLA provides all the statutes of limitations necessary. First, CERCLA provides statutes of limitations for "initial" cost recovery actions:

> An ***initial action*** for recovery of the costs referred to in section 9607 of this title must be commenced –
>
> (A) for a removal action, within 3 years after completion of the removal action . . . ; and
>
> (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action . . .

CERCLA § 113(g)(2) (emphasis added). Second, CERCLA provides statutes of limitations for all other actions which are not initial actions:

> No action for contribution for any response costs or damages may be commenced more than three years after –
>
> (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
>
> (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

CERCLA § 113(g)(3). When read together, these statutes of limitations cover the gamut of causes of actions under CERCLA and leave no "gap" to be filled in this case.

When, without an "initial action" and without any prior adjudication of liability, one PRP seeks response costs from another PRP, the first PRP's action is subject to the statutes of limitations contained in CERCLA § 113(g)(2). Under those circumstances, the first PRP must file the "initial" cost recovery action within three years after completion of a removal action or within six years after initiation of physical on-site construction of a remedial action.

Petitioners ignore the statutory language and focus on "innocent" and "non-innocent PRPs," words not found in the statute. The timing of the contribution action is the important consideration, not the status of the Plaintiff. This distinction undermines Petitioners' entire argument.

This conclusion is further supported by the language of CERCLA § 113(f) which provides that any person can

seek contribution during or following any "civil action," but does not prevent the bringing of a contribution action in the absence of a civil action under §§ 106 or 107. *See* CERCLA § 113(f). In other words, Congress recognized there would be situations, such as that presented to the Tenth Circuit below, where a contribution action might arise in the absence of the four events specified in CERCLA § 113(g)(3).

The three year contribution statute of limitations in CERCLA § 113(g)(3), on the other hand, applies when one PRP seeks response costs from another PRP as a result of money paid pursuant to one of four liability fixing events. By reading the various statutes of limitations together and in their appropriate context, there is no "gap" left by Congress for the courts to complete.

Since there was no gap in CERCLA's statutes of limitations, there was no need to turn to state law. The Tenth Circuit's opinion below was properly decided and does not conflict with opinions by this Court regarding the borrowing of a statute of limitations from state law or federal common law. Review by this Court is not necessary in this case.

Finally, the Tenth Circuit's opinion below is also wholly consistent with the public policy of CERCLA. Congress passed CERCLA with the intention of providing a "solution to the environmental and health problems created by decades of reckless and irresponsible disposal of chemical wastes." H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 62, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6139 (statement by Albert Gore, Jr.). Congress had two overriding objectives in enacting CERCLA: (1) to immediately

give the federal government the tools to promptly and effectively respond to the national hazardous waste problem; and (2) to hold those who caused chemical harm responsible for the costs associated with hazardous waste cleanup. *United States v. TIC Investment Corp.*, 68 F.3d 1082, 1088 (8th Cir. 1995).

The Tenth Circuit's opinion below allowed for the prompt remediation of the Site, even though the parties could not negotiate a consent decree, and allows for the allocation of the costs of the remediation among those contributing hazardous substances to the Site. The Tenth Circuit's opinion below was properly decided and does not warrant review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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